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RK&K Receives Pinnacle Award

Virginia's top engineering award, the 2018 Pinnacle Award for Engineering Excellence, was presented to a Richmond firm, Rummel, Klepper & Kahl (RK&K), at ACEC Virginia's Engineering Excellence Award Gala. RK&K was recognized for its lead design work on the Route 29 Solutions Design Build Project in Albemarle County. RK&K was one of four engineering firms competing for the Pinnacle, and one of 14 projects in ACEC Virginia's 2018 Engineering Excellence Awards Competition.



RK&K was the lead designer on the \$126 Million project and was supported in design by three major sub consultants, Whitman Requardt and Associates, Rinker Design Associates and Schnabel Engineering. The contractors were a joint venture of Lane Construction and Corman Construction.

Key project elements included:

- A design that reduced travel times in the corridor by 20% and reduced accidents at this major intersection by 50%.
- Improved mobility for through traffic while improving pedestrian and vehicular accessibility to local businesses in the corridor.
- An enhanced corridor with architecturally treated walls, decorative pedestrian lighting and landscaping.
- Innovations, such as the first ever bridge of its kind in Virginia, which led to a \$7.3 Million incentive

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Joint Ventures and Teaming Agreements in Virginia

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Over the years, I have had several clients tell me that they routinely enter into "joint ventures" to pursue certain projects or into "teaming agreements" for certain projects with the expectation that they would be performing the engineering or architectural services if the team were successful. If you have ever considered either of these options, I hope you will spend a few minutes considering the information in the following overview.



Creating Joint Ventures

Under Virginia law, a joint venture is established by an agreement where two or more persons jointly undertake a specific business enterprise for profit, with each sharing the profits (or losses) and each having a voice in management. Although an essential element of a joint venture is that each party have a share in management, Virginia law does not require "equal control" or that one party may direct the actions of the other. Instead, each party simply needs a "voice" in the operation.

Because Virginia law provides that a joint venture, like a partnership, may be created based on an "express" agreement (i.e., written) or on an "implied" agreement (i.e., one which may be deduced or inferred

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RK&K Receives Pinnacle Award

Gala continued from Cover

bonus for early completion and opening of the intersection. "The judges were impressed with all that RK&K did to help solve decades old traffic problems along Route 29 in Albemarle County through the City of Charlottesville" noted Nancy Israel, Executive Director of ACEC Virginia, the statewide association of Virginia engineering firms. "They opened up bottleneck traffic problems, improved stopping sight distance that had caused numerous traffic accidents, took traffic off Route 29, directing it to a parallel road network. And amazingly, they did it in almost half the allotted time frame, completing the work between the University of Virginia's graduation and the first home football game, both peak traffic times."

Also competing for the Pinnacle award were three other Virginia engineering firms: Clark Nexsen, HDR and WSP.

"The judges were impressed with all that RK&K did to help solve decades old traffic problems along Rt. 29"



President's Corner

2018 Rings in the General Assembly, Old Favorites, and New Opportunities

Greetings! This year is off to a great start. Our Joint Legislative Committee (JLC) reviewed 2,500+ bills submitted in the General Assembly. The JLC's role is to review and identify bills that affect our profession and businesses. They met weekly during January into February to provide input and recommendations on issues affecting the engineering industry. We are pleased bills affecting the industry were modified. We will continue to monitor them until the end of the session to make sure the bills passed as amended.

February has been a buzz of activity for ACEC/VA, starting with the annual Engineering Excellence Awards Gala, held at the historic Jefferson Hotel. Congratulations to RK&K, recipient of the Pinnacle Award, and to the other 12 firms recognized for their award-winning designs. During the event we recognized Senator Glen Sturtevant and Delegate David Bulova for their support in strengthening Virginia's engineering profession. In addition, our 2018 Rising Star Award was presented to Jerry Mrykalo, a transportation engineer with Dewberry.

Our first joint AIAVA, AGCVA, and ACEC/VA ACE Virginia event hosted a panel discussion led by the Virginia Department of General Services (DGS), examining common issues in the design and construction process.

Finally, we changed our annual Winter meeting format to a Leadership Retreat in February. This year, Melissa and Tom Laughon with Catch Your Limit Consulting led us through a CEO & Senior Principal Retreat – an opportunity for self-improvement in leadership and developing approaches to assess your leadership team.



Bob Burkholder, PE • President, ACEC VIRGINIA

Education opportunities will continue throughout 2018 with a variety of formats and venues offered to meet your needs. We are currently developing IT Forum and HR Forums. This format, with relevant topics targeted to IT and HR professionals, will generate discussion among member firms in a way that stimulates collaboration and creates an environment where we can learn from each other. The outlines contain meaty content that will be of interest to our member firms regardless of firm size. Thank you to Creighton Barnes, Clark Nexsen, Steve Fey, Proxios, and Patricia Davison, Suits and Souls, LLC, for championing these forums and volunteering their time to bring added value to our member firms.

Please mark your calendars for two great spring events. The annual the Engineering Companies of Virginia Political Action Committee (ECVPAC) Golf Classic will be held on May 22 at The Foundry Golf Club in Powhatan – a course and facility that consistently receives very high reviews. This event is not only an opportunity for networking and increasing your social capital but is one of the primary fund raisers organized by ACEC/VA for the ECVPAC. The ECVPAC is essential to protect and promote the political interests of professional engineers and engineering companies.

Don't miss our Annual Conference to be held at the Homestead Resort June 14 through June 16. This year's event will be the culmination of our 50th Anniversary celebration and will feature educational sessions facilitated by Richard Coughlan, an Associate Professor of Management at the University of Richmond Robins School of Business. He is a familiar face to our members, presenting at several of our past meetings and always leaves attendees with powerful and memorable messages. During this year's Annual Conference, we will be celebrating our 5th graduating class of the Emerging Leaders Institute. This class is full of energy with 29 individuals actively engaged in the sessions.

In addition, as part of our 50th Anniversary celebration we will be recognizing our founding firms and showcasing iconic designs our member firms. We can also look forward to networking with peers and colleagues AND the beautiful facilities and grounds of the Homestead.

It's a great time to be a member of ACEC/VA and better yet to be an active member!

Joint Ventures

Joint Ventures continued from cover

from the circumstances), great care should be taken to avoid unintentionally creating a joint venture when working with other entities. Little formality is required for the formation of a joint venture and the conduct of the parties may justify the inference that a joint venture exists. Moreover, the existence of a joint venture is a factual question to be decided by a judge or jury. As such, you should be exceedingly careful to avoid creating the appearance of a joint venture such as making a “joint proposal” for a specific project.

I know what you’re thinking: What would motivate someone (other than a joint venture member) to file a lawsuit to establish that a joint venture exists? The answer is simple: Money and the desire to extract it from your company’s coffers because you and all of the other members of the joint venture are jointly and severally liable for any debts, obligations, or other liabilities incurred by the joint venture.

Joint and Several Liability

Under Virginia law, each joint venture member is jointly and severally liable to the joint venture’s customers (and third parties) for the joint venture’s debts, obligations, and conduct, including liability for the negligence of a co-venturer. In simplest terms, under joint and several liability a party with a claim against the joint venture may recover the full amount due from any one of the joint venture members. If this sounds a lot like that “general partnership” you’ve been warned about, it is. The laws governing the rights, duties, obligations, and liabilities of joint venturers are substantially the same as those which govern partnerships. Indeed, to the extent that a joint venture agreement fails to address an issue, the Supreme Court of Virginia has ruled that the Virginia Uniform Partnership Act applies. When an issue is not addressed by the parties’ agreement or the Virginia Uniform Partnership Act, the principles of law and equity apply. Accordingly, Virginia courts have held that even when not expressly stated in agreements, joint venturers, like partners, owe a

duty of loyalty, a duty of care, and an obligation of good faith and fair dealing to the other venturers. Here are the rules of the road:

- Each member is fully liable to the joint venture’s customer;
- Each member is responsible for the acts or omissions (i.e., negligence) of other co-venturers for actions taken while acting within the scope of the joint venture undertaking;
- As in a general partnership, each member of a joint venture is both a principal for himself and an agent for the other members within the scope of the joint venture undertaking;
- If a member of a joint venture sustains losses, that member would be entitled to “contribution” from the other members; and
- Each member may be required to account to the other co-venturers for any profits received or losses incurred.

Virginia law is not unique on the issue of joint and several liability. Every state views this issue similarly. Some states, like Virginia, categorize express or implied contractual joint ventures as “joint ventures” and treat them like general partnerships for liability purposes. Other states simply categorize them as general partnerships. The result and the exposure are the same regardless of the assigned term.

Written Joint Venture Agreements

Many engineering firms which would never want to create a joint venture unintentionally are happy to create them contractually. I’ve heard more than once from clients that “it is common for an architect and an engineer to enter into joint venture agreements to bid on government projects.” Although joint venture agreements may be somewhat common in government contracting, the perils of forming a joint venture are the same: it is for all practical purposes a common law general partnership and all members of that joint venture will have joint and several liability to the customer and to third parties. As a lawyer, I would never recommend that a client willingly create joint and several liability with another party. However, I recognize that some firms are in market niches where this may be somewhat common. If you happen to be in one of those niches,

do not have the practical ability to set up an “entity joint venture” as outlined below, and are making the business decision to proceed under a joint venture agreement, you should develop internal guidelines to minimize risks, such as detailed, periodic financial reviews of the other joint venture members, a thorough review of the insurance coverages maintained by each venture member, requiring payment and performance bonds from each member in respect of its obligations to the joint venture, etc. By consulting with your lawyer, accounting firm, insurance broker, etc., you may have a better ability to handicap your risks, but you cannot eliminate them. This is similar to transporting nitroglycerin – it is not to be recommended as things can blow up. If you’re going to do it, however, spend some time and effort minimizing the risks.

Entity Joint Venture

In Virginia (as elsewhere), there are numerous types of business entities, such as corporations, limited liability companies, limited liability partnerships, etc., in which the owners are shielded from the liabilities of those entities. These entities are formally created by filing the requisite documents and once created the entity is a separate legal “person” in the eyes of the law. As such, it has the power to enter into contracts and (assuming it is properly licensed) to provide services, prepare plans, constructs roads or buildings, etc.

Although there are a number of issues (tax structure and the like) which must be considered in selecting an entity type, the bottom line is that there is an entity which you and your co-joint venturers could form, capitalize, get licensed to provide the services the “joint venture” is proposing to provide, obtain the necessary insurance coverages, etc. There are myriad ways to implement entity joint venture. The engineering company member could provide its services as a member of the entity joint venture or it could simply be a subcontractor to the entity joint venture. Slice and dice it however you want. Done properly, the entity joint venture will protect you from the harsh realities found in joint and several liabilities.

Teaming Agreements

A “teaming agreement” involves

two or more contractors agreeing to “team up” to provide a comprehensive proposal for a specific project. As an example, an engineering firm and a general contractor might “team” together to bid on a design-build project. Prior to submitting the bid, the contractor might seek out an engineering company with specific expertise and offer to team with them. This arrangement might include a restriction where the architectural or engineering company agrees not to submit competing proposals for the project. When reduced to writing, the teaming agreement will often have a very clear restriction on the engineering company’s ability to submit a competing proposal for another contractor. The obligation of the general contractor to that architectural or engineering company might be less clear, such as:

General Contractor agrees to negotiate in good faith with the Engineering Team Member to enter into a subcontract for the required engineering services, subject to the approval of the Project Owner and the mutual agreement of General Contractor and the Engineering Team Member.

Although this provision may sound reasonable, the engineering company should ask whether this provision can be used to force the general contractor to use the engineering company. In Virginia, the answer is NO.

As recently as 2016, the Supreme Court of Virginia ruled that a teaming agreement which obligated the parties to negotiate a future subcontract in good faith was unenforceable. Teaming agreements are only enforceable when they contain all of the required elements of a contract under Virginia law, including definite terms such as: (1) the nature and scope of the work to be performed; (2) the compensation to be paid for that work (“a sum, or any reasonably certain method for determining a sum”); (3) the place of performance; and (4) the duration of the contract. Absent the necessary essential terms and sufficient evidence of the parties’ intent to enter into a contract, a teaming agreement is considered a mere “agreement to agree in the future,” and is therefore, not an enforceable contract under Virginia law, which finds “agreements to agree” to be “too vague and too indefinite to be enforced.”

When parties to a teaming agreement intend for it to be a binding, enforceable contract, the teaming agreement must include sufficient specific terms, such as:

- specifically addressing the nature and scope of the work to be performed by the subcontractor;
- providing for the compensation to be paid for that work (e.g., a specific amount, a calculation, or a percentage of the total prime contract’s value);
- the place of performance;
- duration of the contract;
- the contractor’s unequivocal obligation to enter into a subcontract should the contractor receive the prime contract award; and
- if possible, the form of the subcontract to be executed should be an exhibit to the teaming agreement.

Depending on the nature of the proposed project, there may be circumstances when a general contractor and subcontractor do not have enough information about the project requirements to be able to provide the specific terms necessary to form a binding contract. In these instances, the teaming subcontractor should understand that the teaming agreement only benefits the general contractor as the general contractor could prevent the subcontractor from submitting competing proposals for the project, but the subcontractor would not be able to force the general contractor into entering into its subcontract. As a practical matter, you may not be able to force a different result in many cases and may decide to team with a particular general contractor with the hope and expectation that you’ll get the engineering services subcontract. If you do so, proceed with your eyes wide open: hopes and expectations are not contracts.

Disclaimer

This overview is not intended as and should not be considered as legal advice. It is intended solely as an overview and general discussion of legal principles governing joint ventures and teaming agreements. The opinions expressed here are not intended to, nor do they create, any attorney-client relationship.

About the Author

Tom O’Brien is head of Spotts Fain’s Business and Corporate Practice. He represents a number of engineering firms and has handled numerous M&A transactions involving engineering firms. He also serves as outside general counsel to many of his firm’s clients. He may be contacted at (804) 697-2070 or by email at tobrien@spottsfain.com.

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Sources

1. Kancor Americas, Inc. v. ATC Ingredients, Inc., 2016 U.S. Dist. LEXIS 23325, at *38 (E.D. Va. 2016) (applying Virginia law) (quoting Ortiz v. Barrett, 222 Va. 118, 278 S.E.2d 833, 840 (1981)).
2. Norfolk S. Ry. Co. v. Emjay Envtl. Recycling, Ltd., 2012 U.S. Dist. LEXIS 39445, at *23 (E.D. NY. 2012) (applying Virginia law).
3. As noted below, great care should also be taken to avoid intentionally creating a contractual joint venture (as opposed to a joint venture created with a special purpose, a limited liability entity).
4. Smith v. Grenadier, 203 Va. 740, 744, 127 S.E.2d 107, 111 (1962).
5. Id.
6. See PGI, Inc. v. Rathe Prods., Inc., 265 Va. 334, 576 S.E.2d 438 (2003).
7. Roark v. Hicks, 234 Va. 470, 475, 362 S.E.2d 711, 714 (1987).
8. PGI, Inc., 265 Va. at 342, 576 S.E.2d at 442.
9. See id.
10. Id.
11. Qureshi v. Barlow & Borland, L.L.C., 2007 Va. Cir. LEXIS 44, at *21 (Fairfax 2007).
12. Alban Tractor Co. v. Sheffield, 220 Va. 861, 263 S.E.2d 67 (1980); Smith, 203 Va. at 745, 127 S.E.2d at 110-11.
13. Smith, 203 Va. at 745, 127 S.E.2d at 111 (quoting Jackson Co. v. Cty. of Norfolk, 197 Va. 62, 67 (1955)).
14. Gelwicks v. Homan, 124 W. Va. 572, 20 S.E.2d 666 (1942).
15. Navar, Inc. v. Fed. Bus. Council, 291 Va. 336, 347, 784 S.E.2d 295, 300 (2016).
16. EG&G, Inc. v. Cube Corp., 63 Va. Cir. 634 (2002).
17. Cyberlock Consulting, Inc. v. Info. Experts, Inc., 876 F. Supp.2d 672, 678 (E.D. Va. 2012) (applying Virginia law) (quotation marks and internal citations omitted).
18. This is particularly important because the parties’ intentions do not ultimately determine enforceability of a teaming agreement — this ultimate determination falls to a judge or jury. See W.J. Schafer Assocs. v. Cordant, Inc., 254 Va. 514, 519, 493 S.E.2d 512, 515 (1997).



2018 ACE Virginia, A Joint Venture With DGS
Answers Industry Wide Questions

Last month, ACEC/VA held an exclusive, up-close discussion with the Senior Leadership of the Department of General Services (DGS) at the first ACE Forum. ACE is a joint venture of the American Institute of Architects (AIA), Associated General Contractors (AGC) & the American Council of Engineering Companies of VA (ACEC/VA), to educate and promote best practices of the design and construction industry. The session resulted in a better understanding of the decision matrix at DGS, some innovative ideas for DGS to consider and where DGS is going in the future.

Joe Damico, the DGS Director, kicked off the forum with general comments about DGS. There is over \$1.8 Billion of new construction, which they oversee. This forum was a great venue for DGS to discuss complex issues with the design and building community. They may also look for a similar forum to discuss key legislative issues this summer.



After Damico's comments; a panel discussion was led by Mike Coppa and his team of key decision makers. Various topics were addressed:

Technology: DGS is open to what technology consultants want and need.

VEES: The high-performance building act is our guiding principle. DGS is open to the idea of dropping LEED requirements for State Buildings but require High Performance Buildings.

SWaM: All attendees are concerned with the Governors Executive Order 20 concerning the 42% goal of SWaM business. There are over 100,000 vendors, 13,000 are considered "small". It's the decision of the state agency to make the choice of what works best for them.

Business Development: The audience asked, "If you have limited state experience, how do you start gaining that experience?" DGS stated that there are qualification forms and Job Order Contracting (JOC), which was set up as a term contract for the small items like maintenance, as an effort to help firms with little experience begin to gain experience. They also noted that cooperative procurement is not allowed in construction.

Small group discussions followed the panel so attendees could discuss more in-depth issues in charrettes. A networking reception completed the event for participants.

Future forums will be planned around the state and feature federal government, local government, universities and health systems.



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First CEO/Senior Principal Retreat
ACEC Virginia's CEO/Senior Principal retreat was a success. The agenda was specially tailored to provide an upbeat environment at the beautiful Salamander resort while encouraging the participants to explore their leadership techniques. Tom and Melissa Laughon from Catch Your Limit Consulting led exercises exploring cohesiveness, clarity and self reflection. A special thank you goes out to all firms who participated in this first time event.



2018 Transportation Reception
A Great Success

The 2018 Transportation Reception, hosted by ACEC Virginia and Metropolitan Washington continues to engage members in industry wide issues with state transportation agency representatives. One hundred and forty attendees from fifty-one firms took advantage of the networking reception at the Jefferson Hotel Ballroom in Richmond on January 11, 2018.



Virginia Sen. Frank Wagner, the featured speaker, discussed transportation issues of the past several years, focusing on the redevelopment of the Hampton Roads region.

Reception attendees also honored Charlie Kilpatrick and thanked him for his tenure as VDOT Commissioner during the McAuliffe administration.



Rinaldi Joins ACEC VIRGINIA
ACEC Virginia announced they hired Justin Rinaldi to manage the Communication Channels and Design. Justin is originally from Wisconsin while having attended school in Illinois and interning in central Minnesota. Justin earned a Bachelor's Degree in Graphic Communication from Western Illinois University in August, 2017 and an Associate's Degree in Web Development from Waukesha County Technical College (WI) in May 2015. Justin spent seven years working as a photographer in Minor League Baseball and did entry level scouting for one season while attending college. Justin is an identical twin and enjoys exploring the Richmond area. Please welcome Justin Rinaldi to ACEC Virginia team.



National Engineers Week

ACEC Virginia participated in National Engineering Ingenuity Day on February 11th at the Science Museum of Virginia. The next Generation Committee assembled ACEC Virginia's shake table used to simulate the effects of earthquakes on LEGO® structures constructed by future engineers. Representing ACEC Virginia were Nate Dumas with Schnabel Engineering, Patreace Thornton with Mason & Hanger, Jesse Wastler with Systematic Engineering and Augie Kahsar from Alliance Engineering, Inc.





American Council of Engineering Companies of Virginia
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ACEC VIRGINIA UPCOMING EVENTS

MAY 22, 2018
2018 Engineering
Companies of VA ECV
PAC Golf Classic
The Foundry Golf Club

JUNE 14-16, 2018
2018 Annual Conference
& 50th Anniversary
Celebration
The Omni Homestead

Details for all events can be found at www.acecva.org/events